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IN THE

Supreme Court of the United States

October Term, 1968

No. 14

COMMONWEALTH COATINGS CORPORATION,
Petitioner,

-v-

CONTINENTAL CASUALTY COMPANY,
FIREMAN'S FUND INSURANCE COMPANY
AND A. C. SAMFORD OVERSEAS, INC.,
Respondents.

REPLY AND SUPPLEMENTAL BRIEF OF RESPONDENTS

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On the Brief

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REPLY AND SUPPLEMENTAL BRIEF OF RESPONDENTS

The Reply Brief of Petitioner, received by Respondents yesterday, contains such new, inconsistent, and erroneous contentions that Respondents respectfully provide this Reply and Supplemental Brief.

ARGUMENT

To make absolutely certain that no misunderstanding of Respondents' position has been created by the seemingly interminable variations in Petitioner's challenges of the arbitration award and the sheer bulk of the record now before this Court, the following statement is made:

> Not only as a matter of record in this case, but also to the best knowledge of counsel for Respondents as an officer of this Court, let it be said that neither Mr. Capacete, nor Respondents nor their counsel was ever *asked* by Petitioner or anyone representing Petitioner prior to the rendering of the arbitration award whether Mr. Capacete had ever had business relations with any of Respondents, and let it further be said that neither Mr. Capacete nor Respondents nor their counsel in any way *misled* Petitioner, or *concealed* anything from Petitioner, let alone participated together in a "secret cooperation" to "*conceal*" information about business relations as is now for the first time alleged by Petitioner. Reply Br., p. 17.

A. THE ESCALATION OF ALLEGATIONS

It is an onerous burden at each stage of this proceeding to attempt to restrain Petitioner from grossly departing from the facts of this case and to continue to find it necessary to reply to new allegations by Petitioner as each new pleading is filed.

The degree of wrongdoing alleged by Petitioner has reached a new high. Respondents are now, for the first time, faced with the allegation that they and the Chairman of the Board of Arbitration, Mr. Capacete, participated "in a secret cooperation" to "conceal" certain "information," no doubt the "information" that prior to the arbitration proceedings certain business transactions had occurred between Foundation Engineering Company of Puerto Rico and A. C. Samford Overseas, Inc. Reply Br., p. 17.

In the ever-increasing efforts of Petitioner to imply wrongdoing on the part of Mr. Capacete, Respondents and their counsel, Petitioner has departed more and more from the facts and the record.

At the trial of the case in the District Court, as more amply discussed in Respondents' main brief (Br. of Resp., p. 38-40), there was no such extreme charge of misconduct; Petitioner unequivocally admitted the "honesty and integrity" of Mr. Capacete, and stated categorically that no "allegation of fraud" was being made "against the arbitrators" or even that the Chairman had "acted improperly in any way." R. IV, 137(2); A. 75, 80-81, 88. To the Court of Appeals, in its Reply Brief, (p. 1-6) Petitioner suddenly and for the first time reversed its position about Mr. Capacete and challenged his integrity.

In the District Court, no allegation was ever made by Petitioner that, prior to the arbitration award, Petitioner or its counsel had ever *asked* Mr. Capacete or Respondents or Respondents' counsel questions concerning previous business relationships. A. 36-61, 74-183. Suddenly and for the first time, this allegation was

made by Petitioner in its Reply Brief to the Brief of Respondents in Opposition to the Petition for Certiorari (p. 1-2).

Now Petitioner charges "secret cooperation" between Mr. Capacete and Respondent Samford to suppress information. Reply Br., p. 17.

B. "SECRET COOPERATION WITH CAPACETE"

Petitioner alleges specifically,

> "But respondents themselves, in *secret co-operation with Capacete*, the supposedly 'neutral' chairman of the Board, by their concealment of the information which has vitiated this arbitration, are responsible for the present invalidity of the award." Reply Br., p. 17. (Emphasis added).

Nothing in the record supports such a serious and scandalous charge of conspiracy between this arbitrator and Respondents. To the contrary, Petitioners repeatedly stipulated in open court that Mr. Capacete had not done "anything fraudulent" or "acted improperly in any way" Br. of Resp., p. 38-40. To the contrary, Petitioner advised the court,

> ". . . we are in no way attacking the arbitrator's integrity. We believe him to be an honorable man." A. 88.

Respondent's Brief at p. 38 through 41 contains the quotations and record references to these and other such judicial certifications of Petitioner regarding Mr. Capacete which produced this judgment of the trial court:

> ". . . *counsel for plaintiff disclaimed any imputation of bias, partiality, or fraud on the part of the arbitrator involved.* He seeks to overthrow the award on the ground that Samford shouldshave

> informed plaintiff that the engineering firm with which the arbitrator involved was connected had in the past done work for Samford. In view of the fact that, not only has plaintiff failed to offer any evidence showing 'evident partiality' in said arbitrator (9 U.S.C. §10(b)), *it also expressly disclaimed any such imputation*, this objection to the award must be, and is hereby overruled. [Authority cited]." A. 185. (Emphasis added.)

The Federal District Trial Court, after hearing all the other evidence, further found and adjudicated:

> "In closing, I wish to state that the record shows that *the arbitrators conducted fair, impartial hearings;* that they reached a *proper determination of the issues before them*, and that plaintiff's objections represent a 'situation where the losing party to an arbitration is now clutching at straws in an attempt to avoid the results of the arbitration to which it became a party.' [Authority cited]." A. 185-186. (Emphasis added.)

The Court of Appeals held that ". . . the [District] Court was well warranted in finding that there was no prejudice or bias in fact manifested in the course of the proceedings. Indeed, there was considerable evidence which negatived it." 382 F.2d 1010, 1012; A. 194.

On the basis of the record and these lower court findings it is apparent there was no clear partiality, bias or "evident partiality" as found within the Arbitration Act.

Petitioner's belated effort in this regard is really just an attempt to equate non-disclosure with "concealment," but as a matter of common English these are not equivalent expressions. *Corpus Juris Secundum* states,

> "The act of concealment has to do with what concerns others, and implies an act done or procured to be done, which is *intended to prevent or hinder; something more than a mere failure to disclose.* It also implies a *conscious act*, an *active intention to secrete*, a *design*, or *purpose*, *something more than mere silence*, an intention of some sort, and secrecy." 15A C.J.S., *Concealment*, p. 317-318. (Emphasis added.)

Respondents had a right to assume that Petitioner and Petitioner's Puerto Rican and New York attorneys possessed sufficient information to be satisfied with and accept Mr. Capacete as an arbitrator, waiving any right to complain about information it did not have which was readily available. Respondents' many representatives had no idea what Petitioner knew or did not know. From this environment, inaction by Respondent was a natural exercise of a fundamental right found within the adversarial system. To construe this non-disclosure as "concealment" is wholly illegitimate as a matter of definition, as well as by reason in view of the total absence of probative evidence.

C. LACK OF INQUIRY

Petitioner's Reply Brief (p. 4) repeats its earlier unsupported and incorrect allegation,[1] raised for the first time at the Supreme Court level, (see Respondents' Brief, p. 28-32) that Petitioner inquired of Mr. Capacete or Respondents or their counsel about Mr. Capacete's qualifications or relationships. Petitioner relies solely on the affidavit of Mr. Romero. The argument that this affidavit is proof of actual inquiry has been completely rebutted by Respondents' Brief (see pages 51-56).

[1] Reply Br. of Pet. to Br. of Resp. in Opposition to Pet. for Cert., p. 1-2.

Further comment on this spurious argument is unwarranted.

Petitioner has now even gone further and in its new reply (p. 5) contend that Respondents' pleadings and contentions resulted in "' . . . admitting that petitioner's counsel did make inquiry of Capacete." A. 78. Respondents and their attorneys never, expressly, impliedly, or otherwise, made such admission, but always clearly contended the opposite, as the record plainly reveals. A. 65, 78-79. Respondents' brief, especially from pages 42 through 62, reviews the history of the pleadings of all parties in the litigation. This establishes that not only have the Respondents never made such an admission, but that the Petitioners never made such an unsupported and incorrect contention until filing its Reply Brief. A review of the record and Respondents' brief clearly establishes that this is not only a new position, but is inconsistent with the pleadings, allegations, briefs, and implied admissions of the Petitioner itself. More specifically, Respondents' brief and the record at the places therein cited establish that Petitioner never alleged that it made inquiry of Respondents or any of Respondents' attorneys or representatives or Mr. Capacete, but rather maintained only that Respondents had the duty to disclose information regarding Mr. Capacete's qualifications and past relationships. Br. of Resp., p. 44-49. If inquiry had been made, as now alleged by Petitioner, why did earlier pleadings seek to establish a duty to disclose absent inquiry?

It should be further noted that all discussion about inquiry would be rendered moot if in fact Petitioner were aware of the disputed business relationship be-

tween Mr. Capacete and Respondent Samford. Despite Petitioner's purported lack of knowledge here, a strong case for "constructive knowledge" of that relationship has been made in Respondents' Brief (p. 97-99). The following definition is illustrative of the law governing "constructive knowledge":

> "'Constructive knowledge' is defined to be knowledge or notice of circumstances which would put a prudent man upon inquiry as to the fact in question; . . . knowledge which might have been acquired by diligence, but was not acquired." 16A C.J.S., *Constructive*, p. 1239.

In this connection the Georgia Code codifies this legal and equitable principle in the following clear language:

> "Notice extends to facts discoverable.—Notice sufficient to excite attention and put a party on inquiry shall be notice of everything to which it is afterwards found such inquiry might have led. Ignorance of a fact, due to negligence, shall be equivalent to knowledge, in fixing the rights of parties." 12A Ga. Code Ann. §37-116.

> "Negligence and concealment.—If a party, by reasonable diligence, could have had knowledge of the truth, equity shall not relieve; nor shall the ignorance of a fact, known to the opposite party, justify an interference, if there has been no misplaced confidence, nor misrepresentation, nor other fraudulent act." 12A Ga. Code Ann. §37-211.

Considering the small size of Puerto Rico, the magnitude of the work of Petitioner and Respondent Samford, the sophistication of Petitioner's construction management and the close social relationship between Petitioner's counsel and Mr. Capacete, it is very difficult to believe there was not in fact actual knowledge of

previous business relationships. If there was not actual knowledge, in any event there was constructive knowledge for the foregoing reasons and others stated in Respondents' Brief. See Br. of Resp., p. 44-49.

D. "MISREPRESENTATIONS" BY WHOM?

Petitioner in its effort to create suspicion about the validity of the arbitration award has vacillated between Mr. Capacete and Respondent Samford and even counsel for Respondent Samford as to whom is alleged to have been asked about business relations by Mr. Romero, which inconsistencies of position by Petitioner obviously indicate that Petitioner is casting about in a vain effort to create the impression of wrongdoing.

On page 1 of its Reply Brief, Petitioner says, in quoting from the statement of its counsel to the District Court, that the allegation of fraud is not against the arbitrators, but is against the Samford Company. On page 5 of the Reply Brief, however, Petitioner apparently alleges that Petitioner's counsel, Mr. Romero, made "inquiry of Capacete," implying that Mr. Capacete made misrepresentations to Petitioner's counsel since Petitioner's counsel has sworn by affidavit that no one informed him of the business relationships. A. 54. It should be well noted that the only testimony on this point was given by Mr. Capacete, who said that Mr. Romero made no such inquiry. A. 146.

In the Reply Brief of Petitioner to the Brief of Respondents in Opposition to the Petition of Certiorari, at one point Petitioner attacks both Respondents and Mr. Capacete by implying inquiry was made "of the

party or the arbitrator" (p. 1-2). Shortly thereafter, in that brief, Petitioner argues by implication that the affidavit of Mr. Romero states that inquiry was made of the Respondents or their counsel concerning previous business relations (p. 2).

It is manifest there is a significant omission and inconsistency in these allegations. Who supposedly made the alleged misrepresentations?. Is Petitioner saying that it asked *all* of these persons, Mr. Capacete, the Respondents and Respondents' counsel, and that they *all* made misrepresentations to Petitioner? Or, is Petitioner arguing that it asked *one* of these persons or parties and *that person or party* made the alleged misrepresentations? The latter proposition is inconsistent with the allegations, while the former is ridiculous as well as inconsistent with the allegations. It cannot be doubted, irrespective of the vague and obtuse phrasing of these allegations, that Petitioner is saying *someone* made misrepresentations about business relations, but for some reason Petitioner remains totally indefinite, contradictory and silent in saying exactly who.

The only conclusion which can be drawn from such vacillation and failure to be specific about an inquiry allegedly made by Petitioner's own counsel, coupled with the fact that it was not alleged in the District Court that Mr. Capacete, Respondents, or their counsel were even asked, is that this argument is no more than an afterthought interpretation of Mr. Romero's affidavit as a last, frenzied attempt to void the award, regardless of the means.

It bears repeating that the sole basis for the allegation that inquiry was made, not generally, but specifically of Mr. Capacete, Respondents, or their counsel,

is the affidavit of Mr. Romero,[2] which is not evidence, which has been denied insofar as it is purported to make such an allegation, which in fact makes no such allegation, and which is the statement of the counsel who himself made credibility an issue and whose statement as a witness as to objections made in the arbitration proceedings was thereafter disproved totally. See Br. of Resp., p. 51-56.

E. TEXT, CONTEXT, PRETEXT

It is fundamental that any text, taken out of context, becomes a pretext. Petitioner's Reply Brief alleges Respondents' Brief contains errors, omissions, and misstatements. Respondents' Brief faithfully, accurately and fairly quotes from the record which contains portions of the pleadings, counsel's statements, testimony, and other material. Only the relevant portions of the record were quoted dealing with the specific subject being discussed. It is respectfully submitted that a careful reading and comparison of Respondents' Brief and the record will demonstrate that Petitioner's Reply Brief has frivolously charged Respondent with distorting and misquoting the record.

F. IMPORTANT MISSTATEMENTS BY PETITIONER

Rather than making an effort to answer the merits of the arguments of Respondents, Petitioner attempts in its Reply Brief to impeach the brief of Respondents by saying that there are errors, omissions and misstatements in the brief. Many of the allegations made by

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[2] Reply Br., p. 3; Reply Br. of Pet. to Br. of Resp. in Opposition to Pet. for Cert., p. 1-2.

Petitioner do not merit response. However, several of Petitioner's allegations constitute such egregious misstatements of the facts and relate to issues of such importance to the case, that Respondent must additionally refute those not already discussed above.

1.

Petitioner argued that the evidence in the arbitration proceedings did not establish breach of contract by Petitioner and that the award contained no such findings. Reply Br. of Pet., p. 2.

To the contrary, the arbitrators found,

> "Commonwealth [Petitioner] without contractual right abandoned and failed to perform their work on the five subcontracts . . ." (A. 34),

and the arbitrators awarded Respondent Samford $15,872.35 in damages as a result.

2.

Petitioner claims that Respondents' argument (Br. of Pet., p. 14) that Petitioner ratified the authority and its acceptance of Mr. Capacete as an arbitrator by returning to the Board to seek relief is unsound because Petitioner claims that it was ordered to follow this procedure by the District Court. It should be noted that Petitioner made no objection to the qualifications of the Board to hear and rule on the challenges to the award, and it is significant that Petitioner did not in any manner present the issue of fraud to the Board.

3.

Petitioner devotes substantial space in its Reply Brief to questioning the relevancy of Respondents' dis-

cussion of the amount of remuneration received by Mr. Capacete from Respondent Samford and the fact that the services of Mr. Capacete's firm were related to matters unrelated to the painting work on the projects involved. Petitioner's impatience with these points can best be refuted by the simple fact that it is obviously relevant to determine whether business relationships were substantial or insubstantial and whether they were proximate or remote, past or present. Respondents have at length established the insubstantial size and remote nature of the engineering services performed by Foundation Engineering Company a year or more prior to the arbitration proceedings. And of course the Court of Appeals found the matter of degree of importance of the business relationship the key issue in confirming the award. See Respondents' Brief, pages 16-28.

4.

Petitioner alleges that another "gross misstatement of the record" by Respondents is that Samford has always stated, when asked, that Foundation Engineering Company had performed services for Samford. The derogatory implications are that Samford did not make its answer or was not truthful in its answer regarding the issue of business relations. The various pleadings filed by Petitioner to challenge the award alleged business relations between Mr. Capacete and Respondent Samford, and the business relations between these parties as described in the answer of Respondent Samford were admitted forthrightly. A. 65.

5.

Petitioner claims,

> "Respondent's [*sic*] in their brief omit completely any discussion of the responsibility of the neutral

arbitrator as distinguished from the arbitrator designated by the parties themselves." Reply Br., p. 13.

On pages 86 and 87 of their brief Respondents discuss this exact point in distinguishing the *Astoria Medical Group* case.[3] Respondents correctly report that the vast majority of decisions make no distinction as to standards of conduct between arbitrators chosen by the adversaries and neutral arbitrators; in fact, several of the cases relied upon by Respondents where the award was upheld involved charges of partiality of the *third* arbitrator. See especially *Cross Properties, Inc. v. Gimbel Brothers, Inc.*, 225 N.Y.S.2d 1014 (App. Div. 1962), aff'd 236 N.Y.S. 61 (Ct. App.), discussed on page 75 of Respondents' Brief.

6.

Petitioner has alleged in its Reply Brief (p. 10) that the letter of Mr. Currie to the two surviving arbitrators concerning selecting the replacement for Mr. Holman on his death is "evidence of a guilty conscience." As pointed out quite clearly in pages 56-62 of Respondents' Brief, the reservation of rights contained in the letter was inserted only to insure that the rights given to Respondents under the law (the same rights which Petitioner had) were preserved.

7.

Once again Petitioner has misstated the holding of the *Ilios Shipping* case,[4] in a futile effort to distinguish

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[3] *Astoria Medical Group v. Health Insurance Plan*, 11 N.Y.2d 128, 227 N.Y.S. 2d 401 (1962).

[4] *Ilios Shipping and Trading Corp. v. American Anthracite & Bituminous Coal Corp.*, 148 F.Supp. 698 (S.D.N.Y. 1957), aff'd 245, F.2d 873.

the decision.[5] Respondents have been compelled to correct each successive misstatement of the case holding.[6] Petitioner claims that the case holds that an award will not be vacated where,

> "the party seeking to vacate the award had knowledge before the arbitration *of the business relations between the arbitrator and the opposing party.*" (Emphasis added.) Reply Br. of Pet., p. 16.

However, the court states that the *only* facts of which the party seeking to vacate the award had knowledge were that the arbitrator in question was "in the insurance business and associated with John F. Curry Agency, Inc.," *not* that the party knew what *business relationships* his firm had with any party interested in the arbitration. The critical part of the holding in the *Ilios Shipping* case, instead, is that,

> "*Respondent could have inquired concerning the business relationships of his firm [the Curry Agency] to any party interested in the arbitration.*" (*Emphasis added.*)

Most revealingly, Petitioner does not address itself to the fact that in the case at bar, Petitioner with knowledge of the businesses of Mr. Capacete and Respondent Samford and their interrelated character, could likewise have easily inquired of Mr. Capacete, Respondents or their counsel, concerning business relationships. Failing to do so, and remaining silent, constitute a waiver of the objection on this ground.

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[5] See the same misstatement in Br. of Pet. to Court of Appeals, p. 17-18, Reply Br. of Pet. to Court of Appeals, p. 6, and Pet. for Cert., p. 15.

[6] See corrections of the misstatements in Br. of Pet. to Court of Appeals, p. 16-17 and Br. of Respondents in Opposition to Pet. for Cert., p. 18.

G. "UNDERMINING THE ADMINISTRATION OF JUSTICE"

Petitioner's Reply at page 14 states:

> "The astounding contention of respondents, throughout its brief, that they were not required to volunteer information which would disqualify Capacete as an arbitrator (Resp. Br. p. 63), if upheld, would open the door to such corruption and fraud in arbitration and all judicial and extra judicial proceedings that it would undermine the administration of justice either through arbitration or litigation."

This policy argument is impractical, unwise and invalid.

The jury system in both criminal and civil cases, does not require an adversary to volunteer information regarding the qualifications of jurors. It is universal and fundamental that failure to inquire of jurors on *voir dire* examination before they start serving constitutes waiver. Br. of Resp., p. 107-108. Also, it is universal and fundamental that no party is required to volunteer information regarding the qualifications of a judge. Further, no decisions have been found that require *a party* in arbitration to volunteer information to his adversary regarding the qualifications of the arbitrator. These laws and policies regarding juries, judges and arbitrators have prevailed for decades without undermining the administration of justice.

To change these human, reasonable and natural rules will, to use Petitioner's words, "open the door to . . . corruption and fraud" in that a litigant may deliberately avoid inquiry and avoid disclosing his knowledge of possibly disqualifying relationships so that if

he is unsuccessful in the arbitration or litigation, he may then claim the award is void for alleged disqualifying relationships which were easily discoverable or known before the trial or award. Also, the nature, degree and characteristics related to the qualifications or disqualifications of an arbitrator are so variable and relative—business, social, religious, fraternal, kinship by blood or marriage, etc.—often forgotten, remote or unknown, that there would be an unrealistic burden of guessing just what should be voluntarily revealed to an adversary who is not sufficiently interested or concerned to inquire.

Further, the above policy argument of Petitioner's Reply is without merit because the past relationship of Mr. Capacete was not disqualifying. Arbitrators have been described as quasi-judicial and compared to jurymen and judges. Mr. Capacete's past relationship would not have disqualified him to serve on a jury. Also, such a past relationship would not have disqualified him to serve as a judge of this same case, even under the high standards imposed on a Federal District Trial Judge.

Petitioner attempts to make arbitration more restrictive, legalistic and technical than the law relating to trials by jury or judges. Such would thoroughly defeat the philosophy and practical value of arbitration which is intended to be more informal and flexible. Commercial arbitration is dependent upon consenting contracting parties to select and agree upon their rules and decision-making arbitrators. Contracting parties should still be expected to exercise diligence and be free to waive disqualifications and inquire and accept arbitrators as they desire. Any precedent that would en-

courage the challenge or diminishment of the confidence in the efficiency and finality of arbitration awards would do the commercial world and society a severe disservice by curtailing an otherwise viable remedy now being used increasingly to meet the needs of a growing society of mounting complexity.

CONCLUSION

For all of the above reasons, the decision of the Court of Appeals should be affirmed, thereby confirming the award of the Board of Arbitration, with costs assessed against Petitioner.

This 18th day of October, 1968.

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